Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding	)	Docket No. 2006-3 CRB DPRA
	)	
	)	

RIAA'S UNOPPOSED MOTION TO REDACT THE OCTOBER 2, 2008 DETERMINATION OF RATES AND TERMS

Pursuant to the Order of October 2, 2008, The Recording Industry Association of America ("RIAA") respectfully requests that the Copyright Royalty Judges redact a small amount of information in the Determination of Rates and Terms ("Determination"), dated October 2, 2008, so as to protect commercially sensitive information. This Court has previously ruled that this information should be treated as Restricted pursuant to the Protective Order.

The NMPA, SGA, and NSAI ("Copyright Owners") and the Digital Media Association ("DiMA") have authorized RIAA to represent that they do not oppose this motion. In addition, the Copyright Owners and DiMA have also authorized RIAA to represent that they have no additional information that they intend to seek to redact in the October 2, 2008 Determination.

In particular, RIAA proposes to apply the Protective Order to the following specific references in the text of the October 2, 2008 Determination:

- Page 35, line 18: average effective rates paid by Warner Music Group (WMG) and Universal Music Group (UMG);
- Page 35, line 20: percentage difference between the UMG effective rate and the WMG effective rate;
- Page 36, line 1: average effective rate for Sony;
- Page 36, lines 10-11: average effective first use rates for Sony, WMG, and UMG; and

ATTACHED NOTES

original

- Page 36, line 15: average effective rate for non-controlled songwriters or co-writers for Sony and WMG.

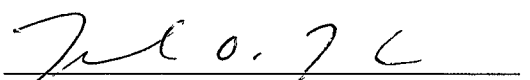
For the convenience of the Court, a copy of pages 35 and 36 of the October 2, 2008 Determination is attached as Exhibit A to this Motion with the specific requested redactions indicated.

As noted above, this Court has already ruled that the information covered by this Motion should be treated as Restricted under the Protective Order. All of the information that is the subject of this Motion derives from the prepared written testimony of Dr. Steven Wildman. At the time of Dr. Wildman's testimony, this Court granted a motion to apply the Protective Order to this information. 5/13/08 Tr. 5788:13-14 (Wildman).

There is no reason to reach a different conclusion now. The information covered by this Motion relates to the average effective rate paid by several individual record companies for the use of musical works. That rate is the product of individual negotiations between those record companies and songwriters and music publishers. If the rate that the record companies are able to obtain in their individual negotiations with songwriters and music publishers were to be publicly disclosed, it would cause significant competitive harm to those companies because business competitors could utilize that information to their advantage in their own negotiations with songwriters and music publishers.

For the foregoing reasons, the Court should grant the Motion and extend the protective order to the portions of the October 2, 2008 Determination that are marked on Exhibit A.

Respectfully Submitted,



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October 3, 2008

Exhibit A

Dr. Wildman based his analysis of potential benchmarks on mechanical royalty data he received from three major record companies: SONY BMG ("SONY"), Warner Music Group ("WMG"), and Universal Music Group ("UMG"). *Id.* at 35. As a preliminary matter, the data from the record companies was limited to mechanical royalties negotiated and paid on one quarter of one fiscal year's releases, including data on which releases involved agreements by singer-songwriters to receive reduced royalties, which releases involved co-writers who had agreed to write songs for reduced rates, and which individual tracks were first uses (and thus not subject to the compulsory license). *Id.* In short, the analysis was based on data from only three record companies and only for a single quarter. Indeed, the data from one of the record companies, UMG, was not even from the same quarter as that from the others.[26] Moreover, Dr. Wildman conceded that the data he received from UMG had limited usefulness since UMG does not separately break out situations in which co-writers agreed to write songs at reduced rates because of similar restrictions that apply to their companion song writer. *Id.* at 36. Dr. Wildman also limited his analysis to rates for physical rather than digital products. In sum, Dr. Wildman himself conceded that his data set was less than ideal. 5/12/08 Tr. at 5850-51 (Wildman).

Based on this limited data set, Dr. Wildman concluded that the average effective per track rates for mechanical royalties for physical products paid by the three record companies ranged from [redacted] for WMG to [redacted] for UMG. Wildman WRT at 37-38. However, there are substantial unexplained differences in the average effective rates he obtains from his analysis of the data both as between different companies (UMG mean [redacted] than WMG mean) and also as between results obtained from different data sources for the same companies (e.g. 7.42

[26] For SONY and WMG, the data was from the third quarter of 2006. For UMG, it was from the fourth

cents mean for SONY from publisher data as compared to [redacted] for SONY from record company data). Even the direction of the latter difference is not consistent for the two companies for which Dr. Wildman presents publisher data. Wildman WRT at 37-39; 5/12/2006 Tr. at 5850-1 (Wildman). Dr. Wildman acknowledges that the agreements he analyzed were negotiated in an environment where the statutory rate is 9.1 cents, which, the Copyright Owners contend is a ceiling above which the record companies will not pay.[27] Dr. Wildman also acknowledged the presence in the agreements of so-called "controlled composition clauses."

Dr. Wildman analyzed just that portion of the agreements that involved the first use of sound recordings, which are not subject to the compulsory mechanical royalty rate, but which may include controlled composition clauses. The average effective per track rates were [redacted] for SONY, [redacted] for WMG, and [redacted] for UMG. Wildman WRT at 42. In addition, Dr. Wildman further analyzed first use agreements involving ostensibly only "pure" songwriters (*i.e.*, not singer-songwriters) or "co-writers who had agreed to controlled rates and all individuals not subject to a controlled composition clause at all." Wildman WRT at 43. The per track average effective rate for this latter group was [redacted] for SONY and [redacted] for WMG. (UMG data did not permit such an analysis). Wildman WDT at 43-44. Yet, these two

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quarter of 2007. 5/12/08 Tr. at 5844.

[27] Under this argument, made by Dr. Landes and others, recording companies have no incentive to pay above the compulsory royalty rate in a voluntary agreement because they can always pay the compulsory rate if they are willing to comply with the compulsory licensing process. *See*, for example, Landes WRT at 39. The evidence in the record suggests that most are not. *See*, for example, Tr. 2/14/08 at 3325-6 (A. Finkelstein). The RIAA's expert economist supplies another view of the compulsory license process compared to that offered by Dr. Landes. *See* Wildman WDT at 31 and n.39 ("[a]s witnesses for both record companies and music publishers have explained, essentially no one uses the compulsory license process—licenses for mechanical royalties for sales of sound recordings are negotiated in the market on a voluntary basis....The fact that they enter into voluntary agreements is not itself evidence that transaction costs [in such agreements] are low. It simply means that the transaction costs of voluntary agreements are lower than those associated with using the compulsory license....").

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October 2008, I caused a true and correct copy of **RIAA'S UNOPPOSED MOTION TO REDACT THE OCTOBER 2, 2008 DETERMINATION OF RATES AND TERMS** to be served upon the following by electronic mail, as well as by first class mail for the names marked below with "*":

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